

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 755
STB Ex Parte No. 665 (Sub-No. 2)**

**FINAL OFFER RATE REVIEW
EXPANDING ACCESS TO RATE RELIEF**

COMMENTS OF CN

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ENTERED
Office of Proceedings
November 12, 2019
Part of
Public Record

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Dated: November 12, 2019

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The U.S. operating subsidiaries of Canadian National Railway (“CN”) respectfully submit these comments on the notice of proposed rulemaking that the Board published in the above-referenced docket on September 11, 2019, which proposes to create Final Offer Rate Review (“FORR”) as a new form of rate reasonableness proceeding.¹ The NPRM, like the Rate Reform Task Force proposal that inspired it, is quite explicitly designed as an attempt to adopt a version of Canadian-style Final Offer Arbitration (“FOA”). The NPRM acknowledges that Congress has not authorized such an arbitration scheme, but it proposes to nevertheless adopt an arbitration-like process for STB decisions in rate cases.

This proposal violates the Interstate Commerce Act, would constitute an unexplained departure from Board precedent that violates the Administrative

¹ *Final Offer Review*, STB Ex Parte No. 755, *Notice of Proposed Rulemaking* (STB served Sept. 11, 2019) (“NPRM”).

Procedure Act, and would create an unconstitutionally vague rate review process. And as a pure matter of policy, the NPRM would create a mechanism that is the worst of both worlds. The NPRM would adopt FOA's one-sided procedural unfairness and its structural incentives against negotiated solutions, but it would not include the features of Canadian FOA that tend to mitigate those negative impacts. While Canadian FOA decisions are entirely private and nonprecedential, the NPRM proposes a public process where a decision in one case could be used as precedent in another.

CN supports the Board's interest in ensuring that small customers with rail movements within the Board's rate reasonableness jurisdiction have access to a low-cost forum for challenging rail rates they believe to be unreasonable. CN agrees that alternative dispute resolution ("ADR") is a potential option for such small customers who may wish to bring a small rate case. CN would support further exploration of these concepts as described below.² But ADR remedies are founded on tradeoffs between accuracy, due process rights, and expedited procedures, and are only appropriate where parties voluntarily choose to be subject to ADR in light of these tradeoffs and the amount in dispute. The Board should reject the NPRM's proposal to mandate final offer arbitration by regulatory fiat, with the Board as

² CN also supports the suggestion of the Association of American Railroads that the Board should consider pursuing a new rate reasonableness methodology designed to streamline the process for the complainant shipper and defendant railroad in a small rate case. Such a process could be appropriately tailored for small rate cases advanced by small customers. *See Letter from Association of American Railroads, STB Fin. Docket No. 755, at 2 (filed Oct. 22, 2019).*

decisionmaker rather than an arbitrator. If the Board wishes to promote ADR, then it should solicit comments to explore ways to better accommodate small rate disputes between a small customer and a carrier in its existing ADR program.

Section I of these Comments details the major ways in which the NPRM violates the statutory scheme, including by ignoring Congress’s refusal to grant the Board power to mandate arbitration and neglecting Congress’s instruction that the agency adopt a methodology for deciding small rate cases. **Section II** details the ways in which the NPRM departs from past Board policies and statutory interpretations without adequate explanation. **Section III** explains why the agency’s proposal is unlawfully vague, because it gives a complaining customer as well as a defendant railroad “no principle for determining” when a challenged rate passes “from the safe harbor” of the permitted “to the forbidden sea” of the prohibited. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991).

Section IV explains some of the practical concerns with the proposal, including the due process problems inherent in Canadian FOA and the protections that the NPRM fails to adopt. **Section V** concludes with some recommendations for a better path forward if the Board wishes to create a more accessible ADR alternative for small rate disputes.

I. THE PROPOSAL VIOLATES THE BOARD’S GOVERNING STATUTE.

A. The STB Has No Authority to Compel Final Offer Arbitration.

The agency should hesitate before proceeding with a proposal that is so squarely designed as an attempt to adopt an FOA process that Congress has not

authorized. Congress has repeatedly declined to adopt mandatory arbitration for the freight rail industry, demonstrating both that the Board lacks any current authority to mandate final offer arbitration and that Congress has been disinclined to provide that authority. Dating back to at least 2002, legislators in both chambers of both parties have introduced bills to require arbitration, none of which have passed into law.³ Indeed, when an STB Reauthorization bill was finally passed out of committee in the Senate in 2014, the bill was amended to provide that any Board arbitration would be voluntary.⁴ The 2015 Reauthorization Act's⁵ expansion of arbitration authority (codified at 49 U.S.C. § 11708) explicitly stated that such arbitration would be voluntary.⁶ Congress also made clear that the arbitrators for

³ S. 158, Surface Transportation Board Reauthorization Act of 2011 (112th Cong.) (Mandated arbitration for rail rate disputes); S. 2889, Surface Transportation Board Reauthorization Act of 2009 (111th Cong.) (Mandated arbitration for rail rate disputes); H.R. 2125, Railroad Competition and Service Improvement Act of 2007 (110th Cong.) (Mandated final offer arbitration); S. 953, Railroad Competition and Service Improvement Act of 2007 (110th Cong.) (Sec. 304, mandated final offer arbitration if either party requests it); S. 2921, Railroad Competition Act of 2006 (109th Cong.) (Mandatory arbitration for railroad at non-railroad option); H.R. 2047, Railroad Competition Improvement and Reauthorization Act of 2005 (109th Cong.) (Mandatory arbitration); S. 919, Railroad Competition Act of 2005 (109th Cong.) (mandated arbitration for railroad party); S. 1103, Railroad Competition Act of 2001 (107th Cong.) (mandatory arbitration at request of non-railroad); S. 2245, Railroad Competition, Arbitration, and Service Act of 2002 (107th Cong.) (Mandatory arbitration at request of non-railroad).

⁴ S. 2777, Surface Transportation Board Reauthorization Act of 2014 (113th Cong.).

⁵ STB Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228.

⁶ See S. Rep. 114-52, at 13 ("S. 808 would maintain the current practice in which arbitration process may be commenced only when both relevant parties opt-in, and it would set the issues, such as rates and practices, that are eligible for arbitration."); 49 U.S.C. § 11708(a) (requiring Board "to establish a voluntary and

any rate dispute “shall consider the Board’s methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.” 49 U.S.C. § 11708(c)(3).

The Board has acknowledged that it “cannot mandate arbitration under the current statute. The statute requires Board adjudication of challenged rail rates, and the Board must take into account the various rail pricing policies articulated in 49 U.S.C. 10701(d)(2).”⁷ In the same proceeding, the Board announced that one of its objectives was “[t]o explore, and provide a record to Congress on, the issue of whether (and how) binding arbitration should be mandated, through legislation, for small rail rate disputes.”⁸ Obviously if the Board had the authority to mandate arbitration, it would not need to create a record for Congress to allow it to do so through legislation. Yet the Board has offered no explanation as to why it now believes it has the ability to adopt an arbitration-like remedy.⁹

binding arbitration process to resolve rail rate and practice complaints subject to the jurisdiction of the Board”).

⁷ *Arbitration—Various Matters Relating To Its Use As An Effective Means of Resolving Disputes That Are Subject to the Board’s Jurisdiction*, STB Ex Parte No. 586, at 3, n.7 (STB served Sept. 18, 2001). *See also Arbitration—Various Matters Relating To Its Use As An Effective Means of Resolving Disputes That Are Subject to the Board’s Jurisdiction*, STB Ex Parte No. 586, at 1 (STB served Oct. 26, 2001) (“current law permits arbitration of disputes within the Board’s jurisdiction only where the parties agree to use that process.”).

⁸ *Arbitration—Various Matters Relating To Its Use As An Effective Means of Resolving Disputes That Are Subject to the Board’s Jurisdiction*, STB Ex Parte No. 586, at 1 (STB served May 22, 2002).

⁹ *See, e.g., FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard

The NPRM suggests that the Board can circumvent the limits to its statutory authority by redesigning final offer arbitration as “Final Offer Rate Review.” But a name change does not alter the fact that most of the elements of the process are the same. The Board suggests that the critical distinction is that the Board itself will make and issue decisions rather than a third party arbiter, but that does not alter the fact that the Board is trying to adopt a drastic regulatory change that Congress did not authorize. *See* NPRM at 5. Congress required arbitration to be voluntary, and it required such arbitrations to “consider the Board’s methodologies for setting maximum lawful rates” and “giv[e] due consideration to the need for differential pricing.” 49 U.S.C. § 11708(c)(3). Regardless of the decisionmaker, the NPRM’s FORR proposal bears all the key hallmarks of an arbitration process that Congress expressly refused to impose on the industry: speed, no standard, and final offer decision-making.

B. The Lack of a “Method” to Determine the Reasonableness of a Challenged Rate is Unlawful.

The NPRM proposal violates the statute in a second, independent way, because it proposes to create a process for deciding FORR rate cases without any meaningful methodology to determine the reasonableness of a challenged rate. The NPRM suggests that this is a virtue that will allow for experimentation. But Congress demanded the Board create a *method* to determine the reasonableness of

rules that are still on the books. ... And of course the agency must show that there are good reasons for the new policy.”). *See also Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) (relying on *Fox* to strike down an EPA rule that departed from previous conclusions).

rates. In the ICC Termination Act of 1995 (ICCTA), Congress instructed the Board to “establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost [(SAC)] presentation is too costly, given the value of the case.” Pub. L. No. 104-88, 109 Stat. 803, 810. In the STB Reauthorization Act of 2015, Congress revised the text of this requirement so that it currently reads: “[t]he Board shall maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [SAC] presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3).

Here, the agency has declared that “FORR does not prescribe a particular methodology.” *See* NPRM at 15. The Board proposes a great deal of procedures that would govern this new process. It details tight deadlines for submissions, lopsided discovery requirements, access to Waybill information, various other timetables, and a final-offer selection process. But no substantive methodology is provided for the Board to use in assessing the reasonableness of the challenged rate or to govern its choice between the competing offers. Instead, the notice proposes that the agency would choose between the parties’ proposed final offers based on its consideration of three general factors: the general transportation policy, the Long-Cannon factors, and “appropriate” economic principles. *See* NPRM at 10.

Because a central feature of FORR as prescribed by the Board is that it will have no guiding methodology, it violates Congress’ statutory command to create a simplified and expedited methodology to determine the reasonableness of a

challenged rate. It is no answer to point to general provisions of the statute as a “methodology,” for all these statutory provisions were on the books at the time when ICCTA was passed. Congress demanded that the new STB go beyond general statutory factors to create a simplified *methodology* to determine whether a challenged rate is unreasonable. And the STB delivered by creating the Simplified-SAC and Three-Benchmark methodologies, each of which sets forth the basic substantive framework that the Board will use to test the reasonableness of the challenged rate. In FORR, the NPRM would return to a regime like that before *Coal Rate Guidelines* and *Simplified Standards* were adopted, where both complainants and defendant railroads are left guessing about the methodology that could ultimately be used to impose reparations and to prescribe future rates. Returning to basic statutory factors that have existed since the Staggers Act without prescribing any substantive methodology violates Congress’ command in 49 U.S.C. § 10701(d)(3) that the agency promulgate rules for a methodology.

C. The NPRM is Unlawful Because It Substitutes a Choice Between “Offers” For a Full Hearing Focused on the Rate Being Charged and the Lawful Maximum Rate.

The NPRM’s proposed process also does not comply with the fundamental scheme first set up by Staggers, which is that a railroad has the right to set rates in the first instance, and that the Board only has the ability to prescribe a different rate if it first finds that the railroad’s rate is unreasonably high. An FORR process in which the Board’s only role is to select between two offers does not comply with this statutory framework.

Under 49 U.S.C. § 10702, a railroad has a statutory right to establish rates for transportation they provide. That right may only be abrogated if “the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation . . . does or will violate this part.” § 10704(a)(1). If the Board makes that finding, it is authorized to “prescribe the maximum rate.” *Id.*

The NPRM is at odds with this statutory framework. The NPRM proposes a binary process where the Board chooses between two “offers”—neither of which necessarily reflects either the challenged rate that is being “charged or collected” by the railroad or the reasonable maximum rate. A choice between those two offers therefore will not include the essential statutory findings on whether the challenged rate is unreasonable. While the Board asserts that it will make a rate reasonableness finding before choosing a final offer, it is difficult to see how the Board can make a rational conclusion about the reasonableness of the rate at issue since it has intentionally refused to adopt any methodology for doing so in FORR. Indeed, the parties to an FORR case will have no advance notice as to what methodology might be used to assess reasonableness, and thus no way to address their arguments to that methodology and develop a full record on it.

Nor will the Board make any findings about the appropriate “maximum rate” for the transportation at issue, as required by § 10704(a)(1). It proposes simply to select the winning “offer,” with no finding that that offer actually represents the reasonable maximum rate. Under FORR, the STB would issue decisions on rates

without ever finding on a full record that the original rate was unreasonable, and potentially prescribing rates at a level lower than the reasonable maximum.

Put differently, the Board has no authority to prescribe a rate that is different from the rate the railroad established unless it finds that the railroad's rate is unreasonably high in violation of the Interstate Commerce Act. Every existing methodology—SAC, SSAC, and Three Benchmark—is thus appropriately focused on testing the challenged rate, and under each methodology a different rate may only be prescribed if the Board finds that the challenged rate exceeds a reasonable maximum. But in FORR, the Board is making a binary choice between the two “final offers,” neither of which has any necessary connection to the challenged rate.

The Board's jurisdiction does not allow it to prescribe the rates that it believes are “best” or “fairest” or otherwise preferable amongst varying options. The statute gives the railroad in the first instance the right to set a rate, and the Board may only supplant that discretion when it makes a specific finding that the rate the railroad has chosen exceeds a reasonable maximum. Because FORR does not establish a process in which the Board will decide after a full hearing that the specific rate charged a railroad is unreasonably high, it would produce unlawful decisions that violate § 10704(a)(1).

II. THE NPRM OFFERS NO REASONED EXPLANATION FOR THE DEPARTURE FROM THE AGENCY'S RATE REASONABLENESS PRECEDENTS.

An agency cannot depart from its precedent without a reasoned explanation. *See, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”). Here, the NPRM does not explain the agency’s sharp break from three important standards it has developed for applying its rate reasonableness authority under the statute.

A. The Board Is Departing From Constrained Market Pricing.

Since 1985, the touchstone for determining the reasonableness of rates has been the Constrained Market Pricing (“CMP”) principles adopted in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 523 (1985) (describing “Constrained Market Pricing as a practical and economically sound method of applying competitive pricing principles to a regulatory framework.”). The ICC described CMP as providing “the proper analytical framework for evaluating the reasonableness of rates charged on market dominant coal movements.” *Id.* at 524. It observed that the new methodology meets the “dual objectives of providing railroads the real prospect of attaining revenue adequacy while protecting captive coal shippers from ‘monopolistic’ pricing practices,” *id.* at 524-25, and the ICC endorsed the application of *Coal Rate Guidelines* for non-coal and simplified procedures. *Rate Guidelines* —

Non-Coal Proceedings, Ex Parte No. 347, slip op. at 1-2 (Sub-No. 2) (served Apr. 8, 1987).

Over the next four decades, the agency consistently affirmed that CMP is the preferred and most accurate procedure available for determining the reasonableness of a challenged rate.¹⁰ It has described the Simplified-SAC method as a “less precise application of CMP.” *2006 Simplified Standards* at 11. While the Board has recognized that the Three-Benchmark test “would not replicate directly the results of a SAC analysis,” it noted that “it would import that constraint indirectly by comparing the challenged rate against rates for other potentially captive movements that are effectively constrained by some form of the SAC test.” *Id.* at 28. And when Congress authorized the Board to create an expedited and simplified method to determine the reasonableness of rates, when the value of the

¹⁰ See, e.g., *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 9 (STB served July 26, 2006) (“*2006 Simplified Standards*”) (“CMP, with its SAC constraint, continues to be our *preferred and most accurate procedure* available for determining the reasonableness of rail rates where there is an absence of effective competition.”) (emphasis added); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 13 (STB served September 5, 2007) (“*2007 Simplified Standards*”) (“CMP, with its SAC constraint, is *the most accurate procedure available* for determining the reasonableness of rail rates where there is an absence of effective competition. The SAC test, which judges the reasonableness of a challenged rate by comparison to the rate that would prevail in a competitive market, rests on a sound economic foundation and has been affirmed by the courts.”) (internal footnote omitted) (emphasis added); *Rate Guidelines — Non-Coal Proceedings*, slip op. at 1-2 (served Apr. 8, 1987) (“Constrained Market Pricing . . . is the most sophisticated and accurate method available for determining the reasonableness of captive rates”).

case could not justify the expense of a full-SAC presentation, it took pains to make clear it did not intend to erode CMP principles.¹¹

Given the central role that CMP has played in regulating rates since 1985, it is striking that the proposed rules fail to even mention the words “Constrained Market Pricing.” Nor is the seminal *Coal Rates Guidelines* decision cited or discussed. And when the Board set forth the amorphous factors it would consider in its proposed final offer process—the rail transportation policy, the Long-Cannon factors, and “appropriate” economic principles—the absence of any mention of CMP principles is striking. The only possible nod to CMP principles is when the STB suggests it may consider “general principles developed in its rate case precedent over decades” but the agency is silent as to which general principles, precedent, or “appropriate” economic principles will guide its future decision-making in individual cases.

In the same vein, every existing methodology recognizes the need to ensure that railroads earn revenues adequate to earn a reasonable return on capital. The SAC and Simplified SAC methodologies are specifically designed to test whether the challenged rate results in revenues higher than what is needed to earn a reasonable return on investment over the facilities at issue. Even the Three Benchmark

¹¹ See, e.g., S. Rep. No. 104-176 (1995) at 5 (“The Committee intends the simplified methodology directed to the Board to complete would apply to cases in which the full stand-alone cost presentation, which encompasses elaborate evidentiary presentations, are impractical. The Committee seeks to assure that the rate complaint process is accommodating of small cases. However, the Committee does not intend to erode the Constrained Market Pricing principles adopted by the ICC for full stand-alone cost presentations.”).

methodology has been designed to reflect carriers' need for adequate revenues through the revenue need adjustment. But FORR does not require the Board to account for this fundamental element of the statute and sound economic regulation.

CMP principles have laid at the heart of freight rail rate regulation since the passage of the Staggers Act. The Board's failure to state that it would be guided in individual FORR cases by CMP principles—or to explain a decision to set aside that touchstone of modern freight rail rate regulation—represent an unwarranted and unexplained departure from agency precedent. As the D.C. Circuit has previously cautioned the agency, the unexplained jettisoning of CMP cannot pass for reasoned decision-making. *See Burlington N. R.R. Co. v. I.C.C.*, 985 F.2d 589, 599 (D.C. Cir. 1993); *Union Pacific R.R. Co., v. I.C.C.*, 867 F.2d 646, 653 (D.C. Cir. 1989) (“it is incumbent upon the [agency] either to apply its new methodology or to explain why constrained market pricing is inappropriate in this instance.”)

B. The Board is Abandoning Its Policy for Calculating the Limit on Relief for Simplified Procedures.

Relatedly, the Board is departing from its considered policies to limit relief available under less precise and simplified rate reasonableness review methods. The Board has historically maintained firm limits on the relief that a shipper can obtain from simplified methodologies in order to ensure that shippers remain motivated to use the most accurate methodology justified by the amount in dispute. The policy was adopted when the Board established the Three Benchmark and Simplified-SAC processes, where the agency recognized it now had three rail rate standards and sought to establish eligibility criteria for each approach. The Board

has a firm policy of setting guardrails to prevent a shipper “from using a more simplistic and *less accurate* procedure to challenge rates on movements” by disaggregating claims that should really be brought together.¹² The Board began with a \$1 million rate relief cap over five years for Three Benchmark and \$5 million under Simplified-SAC over the same period.¹³ The Board based each limit on its “estimates of the litigation cost to pursue relief under the next more complicated, and more precise method.”¹⁴

The Board adhered to this principle when it proposed to create a Simplified Three Benchmark approach in Ex Parte 665:

The ideas presented in the ANPR describe a process that would be significantly more streamlined than the process required to bring a Three-Benchmark case. As such, the relief available under this method would likewise need to be significantly less than the relief available under the Three-Benchmark approach.¹⁵

FORR sharply breaks with that practice by permitting a customer to secure 250% more relief than is available under the Three-Benchmark test. Specifically, the Board proposes a relief cap of \$4 million over 2 years (\$2 million per year) as compared with Three Benchmark’s relief cap of \$4 million over 5 years (\$800,000 per year).¹⁶ This is an abrupt departure from the agency’s practice of setting the

¹² *2006 Simplified Standards*, at 34 (emphasis added).

¹³ *2007 Simplified Standards*, at 27.

¹⁴ *Id.*

¹⁵ *Expanding Access to Rate Relief*, STB Docket No. 665 (Sub-No. 2), at 23 (STB Served Aug. 31, 2016).

¹⁶ NPRM at 14-15.

relief for a simplified methodology at the estimated costs of pursuing relief under the next more complex and precise approach, here the Three-Benchmark approach. The only relief cap that would be consistent with past precedent would be \$250,000, the Board's past prediction of the cost to bring a Three-Benchmark case, perhaps indexed in some fashion.¹⁷ Still worse, the Board's proposal that the same amount of relief available in Three Benchmark could be recovered in FORR over a shorter time frame would effectively more than double the relief that a customer could receive under the Three-Benchmark approach. In theory, a customer could secure up to \$10 million in relief over five years with repeated application of this final offer process, a level of relief the Board has previously stated demands application of the more precise simplified-SAC test.

The Board should not lightly depart from its settled recognition that simplified approaches should only be used in cases where the value of the case cannot justify a more rigorous approach.

¹⁷ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646, at 32 (STB served Sept. 5, 2007) ("We conducted a similar analysis, also set forth in Appendix C, to derive a cost estimate of \$250,000 to present a case under the Three-Benchmark approach. While this figure is also drawn from the shipper's testimony, we believe this estimate is very conservative and reflects the most that a Three-Benchmark case should cost to litigate.").

C. The NPRM is Inconsistent With the Board's Prior Commitment to Mandatory Mediation.

Historically, the Board has required mandatory mediation of rate disputes to “encourage full or partial settlements in at least some cases.”¹⁸ FORR breaks with that policy by purposefully not adopting mandatory mediation.¹⁹ The Board’s only explanation is that such mediation “would add time and possibly expense.”²⁰ But in other settings, the Board has determined that the time and expense of mediation is acceptable in order to promote positive and mutually agreeable outcomes for the parties. Despite that historical practice, the NPRM does not extend the requirement to FORR cases.

While the NPRM contemplates that the parties in an FORR case can request voluntary mediation, there is not sufficient time for voluntary mediation given the extraordinarily compressed timelines that the Board proposes (absent a stay of all proceedings for mediation). Under the accelerated schedule, a railroad will have no realistic ability to pursue mediation in the same 30-day period in which it will be expected to seek and produce discovery and develop a final offer and supporting evidence for that final offer. The Board does not explain why its prior interest in encouraging negotiated solutions—one that led it to impose a 70-day pre-complaint

¹⁸ *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 at 2 (STB served April 3, 2003).

¹⁹ NPRM at 14.

²⁰ *Id.*

notice period for SAC cases—did not lead it to develop an FORR schedule with a reasonable opportunity for mediation.

III. THE PROPOSAL IS UNLAWFULLY VAGUE.

The Due Process Clause “requires the invalidation of laws [or regulations] that are impermissibly vague.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Vagueness doctrine addresses two concerns: “first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Id.* When regulating business conduct, “regulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.” *Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm’n*, 108 F.3d 358, 362 (D.C. Cir. 1997).

No railroad will have fair warning of how to establish lawful rates to satisfy this new process. The Board announced it will be guided by the following factors:

- the 15 Rail Transportation Policies set forth at 49 U.S.C. § 10101;
- the 3 Long-Cannon factors set forth at 49 U.S.C. § 10701(d)(2);
- “appropriate” economic principles;
- the agency’s expertise;
- “general principles developed in its rate case precedent over decades;”
and

- the railroad’s need for differential pricing to permit it to collect adequate revenues.

These factors obscure more than they illuminate. For instance, the Board purports it would be guided by the RTP, but that provision contains “fifteen different and not entirely consistent goals.” *Baltimore Gas and Elec. Co. v. U.S.*, 817 F.2d 108, 112 (D.C. Cir. 1987). Similarly, the Board proposes to be guided by “appropriate” economic principles, without discussing what economic principles it would find inappropriate, leaving the complainant shipper and defendant railroad to “guess at its meaning.” *Fox Television Stations*, 567 U.S. at 253. Factors like these that are “subject to ... open-ended interpretation” leave regulated parties “hard pressed to know when [they are] in danger of triggering an adverse reaction from” regulators. *Timpirano v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993) (remanding for SEC to consider vagueness issue when “five of the seven factors” in agency’s analysis were open-ended). Such uncertainty is unlikely to incentivize a complainant and defendant to reach negotiated resolution of the rate dispute.

And the Board’s proposal to be guided by the Long-Cannon factors is baffling. The ICC explained in *Bituminous Coal-Hiawatha, Utah, to Moapa, Nevada*, 6 I.C.C.2d 1 (1989), that the Long–Cannon factors are statutory criteria for efficiency of carrier operations, which require detailed analysis of contributions.²¹ The Board

²¹ See *Bituminous Coal-Hiawatha, Utah, to Moapa, Nevada*, 6 I.C.C.2d at 9-10:

The first factor, a short-run pricing constraint, requires that rates at all times must contribute to the going concern value of the firm by covering at least their out-of-pocket costs. To meet this requirement, all prices must be set at or above the “directly variable cost” (DVC) of providing the service

has recognized that there is “no feasible way to incorporate such a [Long-Cannon] analysis into a method for resolving small rate disputes without raising litigation expenses and rendering the ‘simplified’ method too expensive.” *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 22 (STB served July 28, 2006) (footnote omitted). This is directly contrary to the Board’s interest to ensure that small customers have an ability to bring small rate disputes to the Board for adjudication under a simplified standard.

Moreover, even if the Board adopts some way in a future FORR adjudication to reflect the Long-Cannon factors in this final offer process, it has offered no explanation for how it will balance these incommensurate interests in a non-arbitrary way. *See Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (balancing incommensurate interests “is ... like judging whether a particular line is longer than a particular rock is heavy”). All these factors are “classic terms of degree” which give regulated parties “no principle for determining” when they pass “from the safe harbor” of the

involved. The second Long–Cannon factor requires carriers to optimally price competitive traffic so as to maximize its contribution to the carrier’s revenue need. In the competitive marketplace, a carrier can be expected to vary its prices between the DVC and the Ramsey optimal level, depending on the elasticity of demand. Examination of a carrier’s pricing under the third Long–Cannon factor requires an analysis of whether one commodity is contributing an unreasonable share of a carrier’s revenues. This unreasonableness can be demonstrated in several ways. A rate can be shown to exceed the Ramsey optimal rate or it can be shown to be higher than needed to eliminate a carrier’s unavoidable shortfall. Alternatively, the rate can be shown to exceed the rate determined by an application of the stand-alone cost test.

permitted “to the forbidden sea” of the prohibited. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). Without giving parties transparency and visibility into the applicable principles that will apply, parties will not be able to accurately estimate the possible outcomes and risks of litigating the rate case. Such uncertainty discourages negotiated resolutions.

The vagueness doctrine demands more than just pointing to differing factors in the statute and vague “appropriate” economic principles. Moreover, even if this proposal somehow satisfies that doctrine, adopting such a deliberately vague standard is arbitrary and capricious. *See Timpirano*, 2 F.3d at 460 (reversing agency’s arbitrary failure to consider whether vague rule could be narrowed and clarified to avoid potential due process concerns); *Ariz. Cattle Grower’s Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.* 273 F.3d 1229, 1250-51 (9th Cir. 2001) (agency action held to be arbitrary and capricious where agency employed “vague” criteria and did not provide a “clear standard” for determining when the criteria were met). A railroad should not be forced to risk incurring an agency order for reparations and a rate prescription because it fails to guess correctly how the agency would weigh its list of factors in any given case and select one offer over another in an FORR adjudication; nor should a customer risk losing a case because it failed to divine the proper methodology the Board would find meets its list of factors. *Cf. Ariz. Cattle Growers*, 273 F.3d at 1250-51 (“whether there has been compliance with this vague directive is within the unfettered discretion of [the agency], leaving no method by which the applicant ... can gauge [its] performance”).

The Board cannot lawfully promulgate an FORR process that has no applicable methodology and that leaves the parties unable to foresee the likely standards that will apply (let alone the range of potential outcomes, likelihood of those outcomes, and associated risks). The purpose of rulemaking is to give regulated parties “notice and predictability,” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012), and FORR does not provide either.

IV. FINAL OFFER RATE REVIEW REPLICATES THE FLAWS OF CANADIAN FINAL OFFER ARBITRATION WITHOUT INCLUDING ANY OF ITS MITIGATING FEATURES.

Even if FORR complied with the statute and with constitutional due process, and even if the NPRM had explained its departures from precedent (none of which are the case), the NPRM proposal is an unworkable policy that should not be adopted. The Board’s proposal to adopt a process similar to the Canadian FOA framework is based upon an unsupported assumption that Canadian FOA is a better system than the robust rate methodologies that Congress has approved. That assumption is wrong and ignores due process problems with Canadian FOA. Moreover, FORR would create a materially worse system than FOA, because it cannot replicate critical mitigating features of Canadian FOA, such as confidentiality and lack of precedential effect.

FOA is a one-sided system with significant due process problems. Under the FOA process, a shipper has full control of the schedule. They are able to prepare for FOA at their leisure, taking months to develop a fulsome analysis, hire expert witnesses or consultants, and draft submissions in advance. Because there is no

preliminary requirement for any good faith negotiations before the FOA process is commenced, in many instances, a railroad often is only made aware of the shipper's intent when served with a notification of the FOA. Upon five days' notice, the shipper may trigger the FOA process. The railroad then has only 10 days to submit, simultaneously with the shipper, its final offer with dollar amount. Within 15 days from the date the agency submits the case to an arbitrator, parties must submit all supporting information. These timetables restrict the railroad's right to fairly and adequately answer applications. Because it is so short, the process effectively deprives the railroad of the ability to thoughtfully develop its case in a way that would tend to lead to negotiated resolution by exposing the flaws in a shipper's case.

The significant strategic advantage a shipper has is compounded by the fact that FOA proceedings take place within an extremely compressed period of 60 days during which final offers and pleadings are exchanged simultaneously, depriving a railroad of necessary knowledge and understanding of the case that it has to meet before it files its own submission. A railroad is given mere days to respond to an economic analysis that a shipper could spend months developing. Throughout the entire process, the railroad is forced to scramble to catch up, having to abide by extraordinarily short deadlines.

Furthermore, the Canadian process contains no requirement for good faith mediation efforts before initiating FOA. A shipper is not required to attempt to mediate their disputes with the railroad before filing its complaint. The lack of such

a requirement limits opportunities to negotiate a commercial agreement prior to filing an FOA complaint.

The significant flaws of the FOA process are somewhat mitigated by two key features. First, the FOA process and results are completely confidential. Second, FOA decisions are explicitly considered non-precedential. These are important mitigating factors for a process that is inherently driven toward speedy—as opposed to accurate—results, and that does not provide sufficient time for a fulsome analysis by the rail carrier. Because the decisions are confidential and non-precedential, the impact of any individual decision is limited.

The Board’s FORR proposal replicates the flaws inherent in the FOA process, without any of these mitigating measures. The result is a process that is more unbalanced and harmful than the Canadian FOA process. For starters, FORR would be public and decisions would be precedential. The consequences of FORR decisions are thus vastly different than in FOA, since a single decision on a limited record could have wide-ranging effects on future cases. Indeed, the Board touts the precedential nature of FORR as a benefit, suggesting that FORR will create “incentives for methodological improvements over time.”²² But the breakneck procedural schedule the NPRM proposes is not conducive to the development of innovative methodological improvements or to any kind of reasoned examination of new methodologies that are proposed.

²² NPRM at 11-12.

Furthermore, the Board proposes to award relief in the form of reparations, which are not available in FOA, significantly increasing the potential financial impact of the process.²³

In short, the Board's proposal for a public, precedential process offers none of the protections that the already flawed Canadian FOA process provides.

V. THE BOARD SHOULD EXPLORE EXPANDING ITS EXISTING VOLUNTARY ALTERNATIVE DISPUTE RESOLUTION PROGRAM TO BETTER ACCOMMODATE SMALL RATE DISPUTES.

For the reasons stated above, the Board should close this docket with no further action. CN appreciates that the Board is interested in alternative dispute resolution. As the Board has explained, it “favors private resolution of disputes where possible.”²⁴ CN also favors private resolution of disputes with its customers.²⁵ But the Board cannot avoid the essential element of an ADR solution, which is that such a solution must be voluntary. Forced ADR-like solutions will lead to a host of statutory obstacles and poor policy outcomes, like those detailed above.

The Board currently allows railroads and customers to opt-in to arbitration for certain types of proceedings, which now include rate disputes pursuant to 49 U.S.C. § 11708. But the current arbitration rules are designed to cover rate

²³ NPRM at 14.

²⁴ *Arbitration—Various Matters Relating To Its Use As An Effective Means of Resolving Disputes That Are Subject to the Board's Jurisdiction*, STB Ex Parte No. 586, at 1 (STB served Oct. 26, 2001).

²⁵ Recently, CN gave notice that it consented to participate in arbitration for demurrage charge disputes ranging from \$3,000 to \$200,000 in value. *See Assessment of Mediation and Arbitration Procedures*, STB Ex Parte No. 699, CN Notice of Opt-In (STB filed July 1, 2019).

proceedings up to \$25,000,000. If the Board is interested in exploring arbitration procedures with designed procedural limitations to improve access for small cases, it should solicit comments on whether its ADR program should include a targeted ADR avenue for small rate disputes. CN suggests four essential guideposts for such a potential ADR program for small rate disputes.

First, the Board should require mediation before a small rate dispute can use the ADR process. The Board has made great strides in developing its mediation program, using trained, neutral, third-party mediators who have proven effective in quickly resolving many complex regulatory disputes. And in 2003, the Board required mandatory non-binding mediation of rate reasonableness disputes.²⁶ The Board similarly could require non-binding mandatory mediation before the use of alternative dispute resolution procedures for a small rate case.

Second, the decisions should be confidential and non-precedential. Under its current ADR program, the Board requires the publication of arbitration decisions, with confidential information redacted from the decision. For small rate disputes, the Board should consider modifying this feature of its existing program to preserve the commercial confidentiality of rates and to encourage parties to engage in a Board-sponsored ADR process for small rate disputes. It would be appropriate, however, for an unredacted copy of the decision to be served on the Board, so long as the Board considers the decision confidential and will not post it on its website (as is

²⁶ *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 (STB served April 3, 2003).

the case for unredacted copies of decision served on the STB under the existing ADR program). This would permit the Board to monitor its ADR program in small rate cases.

Third, the Board should place a reasonable limit on relief a shipper could seek through such a simplified ADR program (such as \$250,000).

Finally, ADR must be voluntary by both parties. This is the defining feature of alternative dispute resolution. Any attempt by the STB to force ADR on a customer and a carrier would be contrary to the key goal of ADR: creation of a voluntary pathway to an informal dispute resolution process that the parties can tailor to suit their needs given the particular dispute, their ongoing commercial relationship, and the opportunities in informal dispute resolution to develop potential creative resolutions that are not available in formal adjudications.

VI. CONCLUSION

The Board should close this proceeding and instead solicit comments to explore amending its ADR program to better accommodate small rate disputes.

Respectfully submitted,

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Dated: November 12, 2019